

**United States Department of Labor  
Employees' Compensation Appeals Board**

\_\_\_\_\_  
**M.P., Appellant** )  
 )  
**and** ) **Docket No. 11-332**  
 ) **Issued: September 26, 2011**  
**TENNESSEE VALLEY AUTHORITY,** )  
**PARADISE FOSSIL PLANT, Drakesboro, KY,** )  
**Employer** )  
\_\_\_\_\_ )

*Appearances:*  
*Ronald K. Bruce, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 23, 2010 appellant filed a timely appeal of the October 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied appellant's claim. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant met his burden of proof to establish that he developed pneumoconiosis or chronic bronchitis in the performance of duty.

**FACTUAL HISTORY**

On October 8, 2009 appellant, then a 55-year-old yard mechanic technician, filed an occupational disease claim, alleging that he developed pneumoconiosis and chronic bronchitis from exposure to asbestos insulation on turbines and valves and from inhaling coal dust. He

\_\_\_\_\_  
<sup>1</sup> 5 U.S.C. §§ 8101-8193.

became aware of his condition and realized it was causally related to his work on July 21, 2009. Appellant retired on January 5, 2009.

Appellant noted that he worked for the employing establishment intermittently beginning in 1983 in construction and became a regular employee on June 22, 1999 and worked as a pipefitter until October 24, 2008. He was exposed to asbestos that was used in the insulation on turbines and valves. Appellant noted using a hammer to knock insulation off the valves and inhaled the airborne asbestos dust. He was also exposed to coal dust which was produced when pulverizing and conditioning coal and from welding smoke and fumes. Appellant occasionally wore a paper mask. He worked for the Local 633 plumbers and pipefitters union from 1981 to June 21, 1999 and reported being exposed to welding fumes, smoke and coal dust at power generating plants and did not wear a protective mask. From February 1975 to 1981, appellant worked at Peabody Coal Company and was an underground coal miner and operated scoops, shuttle cars and loaders and was exposed to coal dust and rock dust on a daily basis and did not wear a protective mask. He submitted an employing establishment job application and a job history summary.

Appellant submitted an August 15, 2009 report from Dr. Glen Baker, a Board-certified pulmonologist, who evaluated him for possible dust-induced lung disease. Dr. Baker noted appellant's work history was significant for working as a pipefitter and welder for the employing establishment where he was exposed to asbestos, coal dust and magnetite. He advised that appellant stopped work on January 5, 2009 secondary to being diagnosed with Parkinson's disease. Appellant smoked for 30 years at the rate of one-half pack per day. Dr. Baker stated that an April 29, 2009 x-ray of the chest was consistent with occupational pneumoconiosis secondary to asbestos exposure and based on a 2000 International Labor Organization (ILO) Classification was consistent with pulmonary asbestosis. He diagnosed occupational pneumoconiosis and bronchitis. Based on appellant's history of asbestos exposure, the x-ray changes were primarily due to asbestos with some changes secondary to coal dust exposure. Dr. Baker noted appellant's bronchitis was due to industrial exposure and cigarette smoking. An August 15, 2009 pulmonary function test revealed no abnormalities. In a July 3, 2009 B-reading, Dr. Baker noted parenchymal abnormalities consistent with pneumoconiosis.

The employing establishment submitted an October 9, 2009 assessment from an industrial hygienist who evaluated appellant's work environment. The evaluator noted that the exposures to respirable dust at the employing establishment were under the applicable Occupational Safety and Health Administration (OSHA) limits. He noted that the employer had a strong respiratory protection program and industrial hygiene assessments of the work area are ongoing and adequate to maintain exposure levels below OSHA permissible limits.

In an October 21, 2009 letter, OWCP advised appellant of the evidence needed to establish his claim. It requested that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific work factors. OWCP also requested that the employing establishment provide comments from a knowledgeable supervisor addressing appellant's allegations.

On February 24, 2010 OWCP referred appellant for a second opinion to Dr. William C. Houser, a Board-certified pulmonologist. It provided Dr. Houser with appellant's medical records, a statement of accepted facts and a detailed description of appellant's employment duties. In a March 16, 2010 report, Dr. Houser reviewed the medical records and occupational

history. He noted findings upon physical examination of lungs clear to percussion, clear auscultation, no rales or wheezing and no rhonchi, pleural rub or bronchial breath sounds. Dr. Houser noted an x-ray of the chest dated March 18, 2010 and a pulmonary function test revealed no abnormalities. He referenced a B-reading performed by Dr. Daniel W. Whitehead, a pulmonologist, dated March 23, 2010, which revealed no parenchymal or pleural abnormalities consistent with pneumoconiosis. Dr. Houser found no evidence of pneumoconiosis or pulmonary impairment and Parkinson's disease.

In a March 10, 2010 statement, the employing establishment acknowledged that appellant was employed as a steamfitter and could not confirm or deny his statement of exposure. The employing establishment noted that it provided respiratory protection programs designed to protect workers by limiting the inhalation of airborne contaminants such as dust, gases and vapors. It stated that annual respiratory fit tests were performed and respiratory protection training was also provided.

In a decision dated April 19, 2010, OWCP denied appellant's claim, finding that Dr. Houser's report did not establish that he developed the claimed pulmonary conditions as a result of his employment.

On April 29, 2010 appellant requested an oral hearing. A telephone hearing was held on August 9, 2010. Appellant submitted an August 13, 2010 B-reading performed by Dr. Mathew A. Vuskovich, a Board-certified pulmonologist, on a March 18, 2010 x-ray which revealed parenchymal abnormalities consistent with pneumoconiosis, primary and secondary small opacities in the middle and lower zones of the left and right zone with a profusion score of 1/1. Dr. Vuskovich noted no large opacities. He also submitted employing establishment medical records from February 7, 1983 to April 24, 2002, which noted treatment for a lumbar strain, foot injury and eye burn.

In a decision dated October 22, 2010, an OWCP hearing representative affirmed the April 19, 2010 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim. When an employee claims that she sustained an injury in the performance of duty, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. Appellant must also establish that such event, incident or exposure caused an injury.<sup>2</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the

---

<sup>2</sup> See *Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). See generally *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>3</sup>

### ANALYSIS

On October 8, 2009 appellant filed an occupational disease claim alleging that he developed pneumoconiosis and chronic bronchitis from exposure to asbestos while working as a construction worker, pipefitter and yard mechanic technician. On October 22, 2010 the hearing representative affirmed OWCP's denial of the claim based on Dr. Houser's second opinion report which found that appellant's claimed condition was not employment related.

The Board finds that there is a conflict in medical opinion between Dr. Houser, the OWCP referral physician, and Dr. Baker and Dr. Vuskovich, appellant's treating physician, all of whom are Board-certified specialists.

Dr. Houser found no evidence of pneumoconiosis or other pulmonary disease. He noted an x-ray of the chest dated March 18, 2010 and a pulmonary function test revealed no abnormalities. Dr. Houser advised that a March 23, 2010 B-reading by Dr. Whitehead revealed no parenchymal or pleural abnormalities consistent with pneumoconiosis. By contrast, Dr. Baker, appellant's treating physician, diagnosed occupational pneumoconiosis and bronchitis. He noted an April 29, 2009 x-ray of the chest was consistent with occupational pneumoconiosis secondary to asbestos exposure and based on an ILO Classification consistent with pulmonary asbestosis. Dr. Baker opined that based on appellant's history of asbestos exposure his x-ray changes were primarily due to asbestos with some changes secondary to coal dust exposure. He further noted a July 3, 2009 B-reading noted parenchymal abnormalities consistent with pneumoconiosis. Similarly, Dr. Vuskovich, a B-reader, noted that a March 18, 2010 x-ray revealed parenchymal abnormalities consistent with pneumoconiosis, primary and secondary small opacities in the middle and lower zones of the left and right zone with a profusion score of 1/1. The Board therefore finds that a conflict in medical opinion has been created.

---

<sup>3</sup> *Solomon Polen*, 51 ECAB 341 (2000).

Section 8123 of FECA<sup>4</sup> provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>5</sup>

The case, therefore, requires remand for an impartial medical specialist to resolve the conflict in the medical opinion regarding appellant's diagnosis and its relationship to his employment. On remand, OWCP should refer the case record and a statement of accepted facts to an appropriate physician to reevaluate the evidence pursuant to section 5 U.S.C. § 8123(a). Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 22, 2010 is set aside and the case remanded for further action consistent with this decision.

Issued: September 26, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

---

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8123(a); *see also* *Charles S. Hamilton*, 52 ECAB 110 (2000); *Leonard M. Burger*, 51 ECAB 369 (2000); *Shirley L. Steib*, 46 ECAB 39 (1994).